INDEX.

	Page.
The statute involved	1
The pleadings	3
The facts	6
Argument	31
Matters relating to the interpretation of the Reclamation Act and the contract of May 31, 1906	31
Matters relating to the amendment of the bill of complaint and the admission of testimony	43
Matters relating to the completion of the project	49

CITATIONS.

Bodkin v. *Edwards*, 255 U. S. 221	50
Brewer-Elliott, etc., v. *United States*, Adv. Op. Nov. 13, 1922	50
Kihlberg v. *United States*, 97 U. S. 398	51
Milwaukee Pub. Co. v. *Burleson*, 255 U. S. 407	51
Payette-Boise, etc., v. *Cole*, 263 Fed. 734	32, 41
Swigart v. *Baker*, 229 U. S. 187	31, 42

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

YUMA COUNTY WATER USERS' ASSOCIATION, ROBERT H. THEILMANN, J. A. DONOVAN, et al, appellants,
v.
W. W. SCHLECHT AND DAVID C. CAYLOR. } No. 268.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR APPELLEES.

THE STATUTE INVOLVED.

Section 4 of the Reclamation Act of June 17, 1902 (32 Stat. 388, 389), reads:

> That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the

> reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

The plaintiffs contend that on May 10, 1904, the Secretary of the Interior gave the public notice therein required, assessing a charge of $35.28 per acre (7). The defendants, on the contrary, contend that the charges were not fixed until the issuance of the public notice of April 6, 1917 (469), at which time a construction charge of $75 per acre was imposed.

THE PLEADINGS.

The pleadings, which are inordinately long, can be briefly summarized. The plaintiff corporation was organized in 1903 (142), with power to contract with the United States with reference to the collection and payment of charges imposed under the Yuma project against the lands in what is known as the Lower Colorado Irrigation District. This district, the bill alleges (5), comprises three main areas, designated as tracts A, B, and C, shown on the map at p. 40. The bill proceeds on the theory (7) that the Secretary of the Interior, on May 10, 1904, determined that the irrigation of all these tracts was practicable and advisable, and accordingly caused contracts to be let for the construction of the Laguna dam across the Colorado River, and of levees along the banks of the Gila and Colorado rivers; that he determined and estimated the cost at $35.28 per acre, and gave public notice to this effect; that he thereupon set aside $3,000,000 for construction; gave public notice of what lands were irrigable under the project, tracts A, B, and C being included; and that the payment of the annual instalments, ten in number, would begin on the completion of the project. The plaintiff corporation was organized, at the suggestion of the Secretary, by the owners of private lands within the district, for the purpose of negotiating with the Secretary, under the provisions of the Reclamation Act, to secure government aid; and that the shareholders, by becoming members, mortgaged their lands as security

for the payment of the estimated cost and charges; that about May 28, 1904, the various landowners, relying on statements of the reclamation officials that the project would be completed within two years, at a cost of $35.28 per acre, became shareholders, and thereby mortgaged their lands to secure this cost; and that they would not have done so if they had known that the cost would exceed this amount. It is alleged that the Secretary, from surveys made, determined that the construction of the project, including levees and a drainage system, was practicable and advisable; and that certain officials, duly authorized by the Secretary, promised the landowners, on May 28, 1904, that the project as a whole would be completed at a cost of $35.28 per acre; and that all of tracts A, B, and C would receive water. It is then alleged that on May 31, 1906, the United States entered into an agreement (14) with the plaintiff corporation, to the effect that the estimated cost should be divided into not less than ten annual instalments, the first to be payable on completion; that the cost should be equal throughout the district; and that this plaintiff guaranteed the payments.

It is then alleged that tracts A and B have been wholly eliminated from the project, and that no drainage system has been constructed for tract C, with certain exceptions, although one is necessary; that a drainage system for that tract is in process of construction but can not be completed short of two and one-half years; and that 44 per cent of the project remains uncompleted.

It is then alleged that during the process of construction the Government acquired two private irrigation systems, from which it has been supplying certain lands with water until its own project could be completed; that notwithstanding all of the foregoing, the Secretary, on April 6, 1917, wrongfully issued a public notice imposing a charge of $75 per acre on the lands in tract C, upon the theory that the project is now completed and that the time for payments is at hand, notwithstanding the fact that the contract of May 31, 1906, provides that the charges shall be equally assessed on all of the lands within the district, including tracts A and B, as well as C, and notwithstanding the fact that the drainage system is still uncompleted as to tract C, to say nothing of the entire elimination of tracts A and B. It is then alleged that the landowners, under the public notice of April 6, 1917, are given the option to initiate a water right, by using a written form drawn by the Secretary, to be signed not later than December 31, 1917, under which the landowners obligate themselves to pay $75 per acre; and that the Secretary has given notice that unless they sign by the date just mentioned, no more water will be furnished; that the landowners are dependent upon water; and that if the Secretary carries out his threat, they will be unable to get water from any other source and their lands will be destroyed. The bill seeks an injunction to enjoin these alleged unlawful acts.

With respect to the answer, it is sufficient to say that it is founded upon the theory that the Secretary of the Interior did not give any public notice under §4 of the Reclamation Act until April 6, 1917; that in imposing a charge of $75 per acre, the Secretary is acting lawfully; and that inasmuch as the bill of complaint is founded on the erroneous theory that a charge of $35.28 per acre was imposed in 1904, the suit must fail.

THE FACTS.

Soon after the passage of the Reclamation Act of June 17, 1902, the Secretary of the Interior caused surveys to be made to determine the feasibility of the Yuma project. These surveys were considered by a board of consulting engineers, who, on April 8, 1904, drafted a report which contained their estimate of the cost of constructing the project (164). They considered certain alternative propositions, a cost estimate being made as to each. Their plans contemplated the erection of the Laguna dam on the Colorado River, and the construction of a canal on the Arizona side of that river, which in its course would cross the Gila River, which flows into the Colorado River near Yuma, 15 miles below the dam. Under date of April 8, 1904, the board, in transmitting their report to Newell, the chief engineer, stated that the lands on the Arizona side are mainly in private ownership and that the estimated cost is so great that the project is not feasible unless all of the land comes in. They call attention to the fact that small portions are held in quantities exceeding

160 acres, and they consider it necessary that these owners guarantee to dispose of their excess acreage in order to make full compliance with the Reclamation Act. They recommend that when these conditions, as well as others, have been complied with, construction be commenced under the general plans prepared, subject to such modifications as may be made in the future by consulting boards, and that the Secretary set aside $3,000,000 for this purpose.

THE MEETING OF THE ENGINEERS WITH THE BOARD OF GOVERNORS AT YUMA, APRIL 8, 1904.

The board of governors of the plaintiff association, as well as a large number of farmers in the valley, met with this board at Yuma on this date. The engineers told these people that the construction charges would be about $35 per acre, and that all persons holding land in private ownership in excess of 160 acres would have to deed the surplus in trust to the association, to be sold to others when the project was completed. The farmers expressed doubts as to the land being able to bear $35 per acre, but the engineers informed them that they had recommended the construction of the project notwithstanding this cost (238, 239). As already stated, the board wrote a letter (235) to Newell, chief engineer, apparently after the meeting was over, transmitting their report (162–168) containing an estimate of the cost of certain alternative plans. A copy of this letter was handed to the farmers (234). In this letter the board state that they have examined the plans and

estimates, etc.; that they approve of the general plan submitted, but have directed further investigations to consider an alternative crossing of the Gila River; that in their judgment it is necessary that the lands in the Indian reservation (on the California side of the Colorado River) bear their part of the cost; that, owing to the great cost, it is necessary that the privately owned lands on the Arizona side join in the project; that owners of more than 160 acres should dispose of the surplus; and then they continue:

> When the conditions above outlined have been complied with, we recommend for construction the Yuma Project under the general plans prepared, *subject to such modifications as have been or may be in future made by consulting boards.*
>
> To this end we recommend that Mr. J. B. Lippincott be instructed to proceed with the preparation of detailed plans and specifications for the project, and that the Honorable, the Secretary of the Interior be requested to give his general approval to the Yuma Project, and that the sum of $3,000,000 be set aside in the reclamation fund for the construction thereof, subject to the fulfillment of the above-described requirements.

THE MEETING OF THE FARMERS AT TULE LAGUNA, MAY 2, 1904.

The next step was the calling of a meeting of the farmers at Tule Laguna, in the Yuma valley, to discuss the project. This meeting was held on May 2,

1904. It was a debatable question whether the farmers should go ahead. Some private canal companies had been supplying them with water, although not in a very satisfactory way, and a new company, known as the Colorado Delta Canal Company, composed of San Francisco capitalists, was preparing plans to build a canal of its own with which to supply the farmers with water from the Colorado River at a cost of $15 per acre (240, 246). It was the consensus of opinion, however, that it was better to join hands with the government (246).

MATTERS OCCURRING BETWEEN THE MEETINGS OF MAY 2, 1904, AND MAY 28, 1904.

Accordingly a letter, dated May 3, 1904, was sent by the plaintiff's officers to the Secretary (247) (printed, p. 213), transmitting: (1) a copy of its articles of incorporation; (2) a petition, also dated May 3, 1904, urging the Secretary to go ahead (248); and (3) resolutions of similar tenor passed by the city council of Yuma and the Yuma board of trade (215).

On May 9, 1904, Walcott, the Director of the United States Geological Survey, addressed a communication to the Secretary of the Interior (199). After calling his attention to the act of Congress of April 21, 1904, authorizing the Secretary to divert the waters of the Colorado River for the reclamation of certain Indian lands in California; the fact that extensive surveys and examinations as to the possibility of diverting the waters of that river have already been made under the Reclamation Act of

June 17, 1902; and to the report of the board of engineers of April 8, 1904; the letter goes on:

> In general the reports indicate that by means of construction of a dam across Colorado River and other works it will be possible to reclaim upwards of 85,000 acres of land at a cost of less than $40 per acre.
>
> * * * * *
>
> The land is extremely fertile in character, the climate is somewhat tropical, and the products have such value per acre that it is believed that the cost of $40 per acre is not prohibitive.
>
> There are a large number of alternatives to be considered and difficult problems to be solved, but the matter has developed from the engineering side to a point where it is possible to consider the larger features and to set aside provisionally a sufficient sum of money to carry out the work contingent upon satisfactory arrangements being made with the owners of lands and vested rights and the complete solution of other matters now pending.
>
> *Recommendations.*
>
> In view of the present condition of knowledge of the project I respectfully recommend that the sum of $3,000,000 be set aside of the reclamation fund, for the construction of the Yuma project subject to the satisfactory adjustment of various matters pertaining to land and water titles and to structural features.

Under date of May 10, 1904, the Secretary replied (204):

> It appears that under the Yuma project and by means of a dam across the Colorado River and other works, upwards of 85,000 acres of land can be reclaimed at a cost of less than $40 per acre. * * *
>
> Your recommendation is that the sum of $3,000,000 be set aside from the reclamation fund for the construction of the Yuma project, *subject to the satisfactory adjustment of the various matters pertaining to land and water titles and to structural features.*
>
> In compliance with your recommendation, I hereby set aside the sum of $3,000,000, or so much thereof as may be necessary, from the fund provided by the act mentioned, for the construction of the Yuma project, *under the conditions you have set forth.*

Under date of May 16, 1904, a communication was addressed by Newell, chief engineer, to the Yuma County Water Users' Association, acknowledging receipt of the letter of May 3, 1904, and the accompanying papers (215). This letter was not received until printed in pamphlets which came to Yuma by express on May 28, 1904 (249), under circumstances presently to be related. On May 10, 1904, at Los Angeles, Lippincott, the supervising engineer, wrote (250) to Bondesson (plaintiff's secretary in 1904; p. 229) at Yuma, in which he says that he sent him that morning the following telegram (250):

> Secretary has allotted three millions for Yuma project conditional on satisfactory

> organization of irrigators and signing of contracts with them. Proposition now entirely dependent on irrigators. Write progress of organization to me and state if arrangements have been made with Kibbey.

The letter then goes on to suggest that arrangements be made by telegraph for Lippincott to meet the plaintiff's officials at Yuma at an early date.

On May 14, 1904, at Los Angeles, Lippincott again wrote the Yuma County Water Users' Association as follows (254):

> I am pleased to be able to officially inform you that the Secretary of the Interior has made an allotment from the Reclamation fund available for the construction of the Yuma project. He has set aside $3,000,000 for this purpose.
>
> About a month ago I prepared for Mr. F. H. Newell a statement which I desired he should make to you in a general way descriptive of the works which we contemplate constructing. At that time he did not think it proper to issue this statement and advised waiting until the Secretary of the Interior had taken action in the matter. He now informs me by wire that I may issue this statement. I have it practically written and prepared to send to you, accompanied by maps and drawings. This statement is to be issued in connection with the negotiating with various landowners to sign agreements with your Water Users' Associations.

The letter also makes suggestions with respect to meeting Newell at Yuma on May 27, 1904, and to

the printing of the pamphlet, the statement being made that it would mean months of delay if done at the Government printing office at Washington; that Lippincott has no appropriation of his own available for this purpose; but that he will have the pamphlets printed at Los Angeles if the plaintiff will bear the expense. The statement which Lippincott in his letter says he prepared for Newell to sign is the reply of May 16, 1904, already mentioned, to the Yuma County Water Users' Association's letter of May 3, 1904, to the Secretary of the Interior. It will presently be mentioned again.

On May 17, 1904, at Los Angeles, Lippincott again wrote Bondesson, at Yuma, with respect to the suggested meeting (257). Accordingly, Lippincott, the supervising engineer, went to Yuma on May 27, 1904, accompanied by Newell, the chief engineer, by Bien, a legal adviser, and by Hall and Hamlin, consulting engineers (259–260).

MEETING WITH THE BOARD OF GOVERNORS AT YUMA, MAY 28, 1904.

On the forenoon of this day the officials last mentioned met with the plaintiff's board of governors, and expressed surprise that the pamphlets had not arrived. Accordingly, Bondesson went down to the express office at noon and got the package (261, 263). The purpose in getting the pamphlets was to distribute them among the farmers, nearly all of whom were in town that day (263). This pamphlet (Ex. 15) is printed in the record at page 213. It contains

three letters which have already been referred to, namely: (1) the letter of the Yuma County Water Users' Association to the Secretary of the Interior, dated May 3, 1904; (2) the reply of May 16, 1904, signed by Newell, chief engineer; (3) in which he incorporates as a part of his reply the Secretary of the Interior's letter to the director of the geological survey, dated May 10, 1904, setting aside $3,000,000 for the construction of the project.

Attention is now directed to the reply of May 16, 1904, signed by Newell, chief engineer, set forth in this pamphlet. It contains this paragraph:

> In reply to your request for information as to cost and character of works projected for your locality, the following general statement is presented. The Secretary reserves the right to make *such revisions in the plans and estimates as further investigations and circumstances may dictate to be requisite for the public welfare* (216).

It deals with the areas to be irrigated under the project; with the head works; with the canals; with the Gila crossing; with the levees; and with the drainage systems. In summarizing it is said:

> The entire cost of this enterprise, providing all the area is irrigated which is indicated above, will amount, according to the estimate, to about $35 per acre irrigated. It is entirely possible, however, that as this construction work proceeds this cost may be somewhat increased or lessened, although an effort has been made to cover all contingencies, and the

> estimates of cost have been liberal. The price will range near $35.00 per acre, this to be paid for according to the provisions of the Reclamation Act and regulations of the Secretary of the Interior, in ten annual installments after the first delivery of water. The annual charge for maintenance and supervision of this system will be very low and probably materially less than $1.00 per acre. There will be no charge for interest, profit, or taxes (224-25).

It also contains a statement that it will be necessary for all of the landowners of the district in Arizona to enter into an agreement with the Secretary of the Interior, through their local water users' association, for the payment of the water when delivered (225).

The minutes of the meeting of the board of governors held in the forenoon were read in evidence to show what transpired, but they disclose that only general statements were made by the reclamation officials (261–263).

Bondesson was requested by either Newell or Lippincott to distribute the pamphlets among the farmers, which he did (263). The landowners were in town that day, a mass meeting having been called for that evening, which had been extensively advertised, to decide whether or not the owners wanted Government irrigation and upon what terms they could get it (263), and the pamphlets (Ex. 15) were circulated among them (264).

THE MASS MEETING AT YUMA ON THE NIGHT OF MAY 28, 1904.

The mass meeting was held in Elks Hall, at Yuma, at 8 o'clock in the evening, the pamphlet being distributed to the people who came late and who had not received a copy during the day (264–5). The president of the water users' association presided, and Newell, Lippincott, Hall, Smythe, and Judge Kibbey, afterwards Governor of Arizona, all spoke (265). Newell stated that he represented the Secretary of the Interior and purported to speak for him. He said in substance that it would require about two years to finish the project from the time the contracts were let; that they were practically ready to let the contracts as soon as the landowners had signed subscription agreements; that the estimates were ample; that they would underrun rather than overrun the estimated figure mentioned in the pamphlet; that the cost would be materially less than $35 in his opinion; and that this figure allowed for everything (265–266).

Lippincott said that they were anxious to get started on letting the contracts for the dam, the completion of which would require the longest period of time; the dam was the key to the entire situation, but that while it was being constructed the rest of the work would go on, so that when the dam was finished the water would be ready; that the dam could be successfully built; that the project would be in every way a desirable one; that it could be constructed within the limit of the estimates; and that

he staked his reputation on this. The people were urged to get busy with the subscription contracts (a sample will be found at p. 209, Ex. 14). These subscription contracts had already been printed for this purpose, and Bien suggested that, in addition to what was already there, a line should be inserted requiring each landowner to sign the articles of incorporation in addition to the contract, and a large number did so (266–268).

A large number signed that night immediately after the meeting broke up, approximately 10,000 acres. A campaign to get all the owners to sign was inaugurated, with the result that about 98 per cent of the private lands had signed up by August, 1904 (268). The pamphlet was used for this purpose (269). This pamphlet was accompanied by a map, and Lippincott also produced for the board of governors at the meeting on the morning of May 28, 1904, a map on a larger scale. It is an enlargement of the map printed in the pamphlet, and both Lippincott and Newell said that it was made to represent the complete plan of the project as nearly as it could be represented on a map (271). This map (Ex. 26) was received in evidence (271).

Bondesson, whose subscription agreement was received in evidence (274), said that he relied upon the statements that were made during the day and also those contained in the pamphlet as to cost and the time when he would get water; and that if he could have foreseen that the project would cost more than $35, or possibly $40, he would not have

signed (275). After the landowners began to sign up, the ownership of the private lands was constantly changing (276). Probably 85 per cent of the land has changed hands, only 15 per cent of those who were owners on May 28, 1904, now retaining title (281). But the same representations as to the cost of the project and the time of its completion were made by the sellers to their vendees (278, 279).

Several witnesses gave testimony similar to that just mentioned as to the statements made at this meeting by Newell and Lippincott (329–332; 340–342; 345–346; 353–354).

These witnesses also stated that they relied upon the representations, and were induced to sign the subscription contracts because of them (333; 341-342; 347; 354).

THE INFORMATION IMPARTED TO LIPPINCOTT AS TO THE RATE AT WHICH THE LANDS WERE COMING IN.

After the meeting of May 28, 1904, Bondesson was in constant communication with Lippincott's Los Angeles office relative to the obtaining of signatures to subscription contracts. Lippincott wrote to the officials of the Yuma County Water Users' Association on this subject under date of June 13, 1904 (282); July 30, 1904 (283); August 17, 1904 (284); and September 27, 1904 (286).

THE DATE CONSTRUCTION BEGAN.

J. G. White & Company were awarded the contract for the construction of the Laguna dam in June, 1905, for $797,650 (428). They began work in July, 1905,

and carried it forward with varying success until they found they were losing money. The conditions were more difficult than expected, and the chief engineer of the Reclamation Service appointed a board of engineers, who visited the dam in August, 1906, and found that conditions were materially different from those expected (379). The contractor was unable to get any more money from his bankers, and was threatened with bankruptcy. Accordingly he was permitted to abandon the work in January, 1907. The dam was about one-third completed at this time (419, 420). The Government thereupon took the work over (419) and operated the same by a "force" account. By the fall of 1907 it was about one-half completed (420).

THE CONTRACT OF MAY 31, 1906, WITH THE YUMA COUNTY WATER USERS' ASSOCIATION.

This contract was drafted in 1904, but there was a delay in getting it executed because certain features were sought to be injected (317). As finally executed it bears date May 31, 1906 (41). In the fall of 1906 it was submitted to a vote of the water users (317). In this connection it is to be noted that the articles of incorporation (1903) of the plaintiff company define in § 3 of article 4 (145, 146) the lands embraced within the lower Colorado irrigation district. Roughly speaking, they comprise tracts B and C. The articles were amended on May 23, 1906 (162), § 3 of article 4 being broadened so as to include tract A (161). The contract of May 31, 1906, pro-

vides, in paragraph 4 (44), that payments for water rights to be issued to shareholders shall be divided into not less than 10 equal annual installments, and that the cost per acre shall be equal throughout the entire district, which is defined as comprising the lands described in the original articles of incorporation, and the amendment thereto already referred to. Paragraph 3 (44) provides that water rights shall not be issued in excess of the acreage capable of irrigation. The Secretary of the Interior is to determine the number of acres capable of irrigation, upon due consideration of all available data, etc. The Yuma County Water Users' Association agrees that it will promptly collect payments, etc., and guarantees the payment of that part of the cost which *shall* be apportioned by the Secretary of the Interior to its shareholders. Paragraph 11 (47) provides that nothing contained in the agreement shall be construed as an approval by the Secretary of the Interior, nor an adoption by him of the articles of incorporation of the association in all their details as the form of organization of water users contemplated and authorized by § 6 of the Reclamation Act of June 17, 1902.

It will be noted that this contract contains no specific description of the lands to be irrigated under the Yuma project; and is absolutely silent as to the cost per acre to be imposed. The position of the plaintiffs, both in the pleadings and during the trial, was that the Secretary of the Interior had determined the charges on May 10, 1904, and that the charges thus fixed should be read into the contract of May

31, 1906 (231). The contract, however, in terms recognizes that the charges have *not* yet been fixed, but are to be fixed in the *future*. (Par. 5; p. 45.)

CHANGES IN THE PLANS AS THE WORK PROGRESSED.

At the time of the meeting of May 28, 1904, there were no surveys or locations which anybody regarded as permanent; only approximate locations of some features, the principal one being the Laguna dam. But even that was subject to change, not only in location but in design; and as a matter of fact its design was substantially changed as well as its location (385–6; 423). The report of the board of engineers of April 8, 1904, contains no estimates as to the cost of the type of dam that was actually built (424). As already stated the contract for the construction of the dam was let to White & Company in June, 1905, to be constructed in two years (435; 437), for $797,650 (428). Owing to unexpected difficulties that company was faced with bankruptcy, and as a result was released from the contract and the Government itself took over the work in January, 1907 (465; 419–420). When finally completed it cost approximately double the original estimate (420), and possibly even as much as $2,100,000 (450), there being no accurate testimony on the subject.[1] The reasons for the heavy increase in cost were explained in detail (380–385; 420).

[1] This matter, however, is cleared up by the annual reports of the reclamation service. According to the 8th annual report, the dam was completed March, 1909 (p. 55), at a cost of $1,640,787.90 (p. 57). The total amount expended on the entire project up to June 30, 1909, was $3,225,425.33 (p. 58). According to the 16th annual report, the amount expended up to June 30, 1917, was $8,387,641.24 (p. 68).

The original plans contemplated a main canal on the Arizona side of the Colorado River, which would cross the Gila River. But the plans were changed in order to make a better and more endurable project. The ravages of the Gila River might entirely destroy the canal, and accordingly it was constructed on the California instead of the Arizona side, and at a point just below the city of Yuma was carried over to the Arizona side by a syphon under the Colorado River (381, 430), which was completed in 1912 (431). Considerable difficulty was experienced in building it, quicksand being present (457). In order to make possible the irrigation and reclamation of tracts A and B, it was necessary to construct levees along both the Colorado and the Gila Rivers, the project not being feasible without them (529). With this object in view their construction was begun. Lippincott, the supervising engineer, believed in good faith that they could be put in in 1904 (498); and likewise believed that the inclusion of tracts A and B (known respectively as the north and south Gila valleys) was feasible and should be put through (494–5). It was, however, found impossible to control the Gila River by means of levees (390), which was one of the reasons why the canal was changed from the Arizona to the California side (381). Upwards of $600,000 were spent in endeavoring to include tracts A and B (the upper and lower Gila valleys), but the effort was not successful (408; 434–5). Levees were built at places along the eastern bank of the Colorado River and along the north

bank of the Gila River, and possibly some on the southern bank (408, 434–5, 486, 488, 508, 511). Levees have been completed below Yuma on the Arizona side (532). As the work progressed, however, it was found impossible to control these rivers (390–1, 430). One of the Government's witnesses (Davis) said that in his judgment the Gila portion of the project (tracts A and B) should have been eliminated from the start (432). He concluded in 1915 that levees were impracticable (436), and that it was not feasible to irrigate these tracts, although this was not appreciated in 1904 (441). It was unwise to include these tracts even if they had had the necessary money (442). Their inclusion renders the project very hazardous, and the present plans are a decided improvement (482). The Colorado River has broken away towards the Gila River, making almost a complete circuit and thereby invading part of the valley which in 1904 they contemplated irrigating (497). One of the witnesses called by the plaintiffs in rebuttal was, however, of the opinion that levees were entirely practicable, and so recommended when he was employed by the Government on the job (506–526). He, however, admitted that an honest difference of opinion might exist (531). When he left the service in 1915 the leveeing of the Arizona side was abandoned and work was confined to the protection of the existing levees (512). The Colorado River has changed its position materially, at places probably a mile or even more (523).

27312—23——4

IT IS, OF COURSE, UNDISPUTED THAT TRACTS A AND B ARE NOT IN THE PROJECT AS NOW COMPLETED.

This fact is admitted by the pleadings. The theory of the plaintiffs is that these tracts were included in the project at its inception, and that under the contract of May 31, 1906, they must bear their proportionate share of the cost. The defendants, on the other hand, while admitting that they lie in what is known as the lower Colorado irrigation district, contend that it is only those lands within this district susceptible of irrigation that are to pay their share of the cost; and that inasmuch as the Secretary of the Interior has now determined that it is impracticable to include them, there is no reason why the remaining lands should not bear their share of the cost.

THE PROJECT IS NOW COMPLETED.

As already indicated, the bill of complaint is founded on the theory that even if it can be said that the Secretary has the right to exclude tracts A and B from the project, it has nevertheless never been completed as to tract C. Under the contract of May 31, 1906, payments are to be made in ten annual installments, the first at the time of the *completion* of the proposed works, or within a reasonable time thereafter upon due notice by the Secretary of the Interior to the association.

The position of the plaintiffs is that the project is not completed as to tract C because a proper drainage system has not been provided. The plaintiffs intro-

duced testimony that a considerable portion of the main drain and whatever laterals are necessary properly to drain the valley, remain uncompleted (359); also that all of the head gates and works of that character have been built of wood instead of cement, as originally planned (366). The defendants, on the other hand, introduced testimony that a larger mileage of canals was built, approximately four times that originally contemplated, and that it is these canals that contain a large number of small wooden structures (381–2). They likewise introduced testimony that the work of the drainage system can not be carried forward in advance of the needs, because the needs are so various both in location and size that it can not easily be done; that the construction of the drainage canal was begun in the lower valley, and that immediately the people protested on the ground that it was not needed (401–2). The farmers passed a resolution asking that its construction be delayed (407). Drainage must be carried out as conditions develop (403), and the time will never come in the present generation when it can be stated that no more drainage is necessary (404), though in a practical sense the project is now completed (405–6). No considerable area has been rendered nonirrigable by lack of drainage (406), and as a practical proposition the works are now completed (440), at least with respect to the lands that can be irrigated (442). The lands are now the most prosperous and most highly productive per acre project in the reclamation service

(461). Another witness said that he regarded the project, so far as the Yuma valley is concerned as a completed one (482), and gave his reasons at length (489–90). On the other hand, the plaintiffs called a witness in rebuttal who said that he did not regard the project as completed, because the levee system was inefficient and nothing short of complete control of the rivers will do (507).

THE FINDINGS OF THE TWO LOWER COURTS AS TO THE COMPLETION OF THE PROJECT.

The district judge, in the opinion which he rendered—under the heading "Have the proposed works been completed?"—found that from a practical standpoint the project was completed on April 6, 1917 (563–564). The Court of Appeals found to the same effect (635).

EVEN AFTER ELIMINATING TRACTS A AND B THE AREA OF THE LANDS INCLUDED IN THE PROJECT UPON WHICH THE CHARGES OF CONSTRUCTION ARE ASSESSED IS GREATER THAN THAT ORIGINALLY CONTEMPLATED.

The report of the board of engineers of April 8, 1904, is divided into two parts, the first being an estimate gotten out in March, 1904 (164), and the second being an estimate gotten out in April, 1904 (187). In the March, 1904, estimate the net amount of irrigable land, both in California and Arizona, was fixed at 76,966 acres (168). In the April, 1904, estimate the net amount was increased to 87,449 acres (189). In the reply of Newell, chief engineer, to the Yuma County Water Users' Association, dated May

16, 1904 (which was printed in the pamphlet already referred to), the statement is made that the irrigable lands on both sides of the river, to be brought into the project, comprise 86,700 acres, of which 73,100 acres are in Arizona (217–8). Tract B, which was eliminated from the project, contains between 6,000 and 7,000 acres (361). There is apparently no evidence in the record as to the area of tract A.[2] Bondesson, when asked its acreage, stated that he did not know, but that the area had been decreased since 1904 by the ravages of the Colorado and Gila rivers (362).

It would appear that there are now approximately 120,000 acres in the project, all of which must bear their portion of the construction charge. Of this amount there are approximately 51,000 acres in the Yuma Valley (tract C); 16,000 in what is designated as the Bard unit, which is on the California side and apparently once a part of the Indian reservation; and about 53,000 acres in what is designated as the Yuma Mesa, which apparently was not included in the project at its inception (449).[3] Of these areas the Bard unit was irrigated first, and

[2] The 14th annual report of the reclamation service (1915), however, makes clear the approximate total acreage in tracts A and B. It is there stated (p. 59) that the lands in the Gila Valley (tracts A and B) comprise 18,000 acres, 8,000 acres of which are on the north side (tract A) of that river.

[3] The 14th annual report (1915) of the reclamation service states (p. 59) that there are approximately 128,000 acres in the projects, apportioned among the *four* units there mentioned. In the 16th annual report (1916–1917) the irrigable area of the project is given at 110,000 acres (p. 63), apportioned among the *three* units there mentioned. It will be noted that one of the units (Gila Valley) is eliminated from the last-mentioned report.

charges have already been assessed against those lands (456, 507). With respect to the lands in the Yuma Valley (tract C), the number of acres furnished with water was gradually increased from 1912 to 1917, until in the latter year the project was able to deliver water to 52,000 acres, although only 27,800 were then being irrigated (458–9). After eliminating sand hills, sloughs, rights of way, canals, and drains the net irrigable acreage in tract C is about 50,500 (545). There never was an accurate determination of the irrigable area in the Lower Colorado Irrigation District at the time the project had its inception, the estimates at that time being merely tentative (385–6).

In determining the construction charges all of the three tracts above mentioned were taken into consideration, notwithstanding the fact that with respect to the lands in the Yuma Mesa it is doubtful if they will ever be irrigated (445). But not only are the lands in the Yuma Mesa charged with their share of the construction cost, but the project has been credited with $1,600,000 on account of a contract entered into with the Imperial Valley Irrigation District in California, under the terms of which that district must pay to the reclamation service the amount just mentioned, if it should decide to take water from the Laguna dam for the irrigation of lands in the Imperial Valley in California (445-9).

Whether this irrigation district will ever avail itself of the privilege just mentioned is, of course,

problematical, but the Secretary of the Interior acted upon the assumption that the money was actually in his hands, and therefore gave the project credit for this amount in determining the charges to be assessed against the land, within the project (451–2). The farmers endeavored to get the Secretary of the Interior to give them a double credit for this $1,600,000 on the $75 per acre charge, but were told that this could not be done without Congress giving its sanction (452–4).

THE ARRANGEMENTS MADE TO SUPPLY THE FARMERS WITH WATER PENDING THE COMPLETION OF THE PROJECT.

As already stated, the syphon at Yuma was completed in 1912, but prior to that time the government had purchased existing canals that were no longer in operating condition, and served the lands from these canals. After the completion of the Yuma syphon across the Colorado River, water was delivered by gravity at less than cost. It was a considerable time after the completion of this syphon before the government was ready to deliver water to all of the lands in tract C (430–1; 456). The two small canals which the government bought irrigated somewhere between 1,000 and 2,000 acres, and the owners of the remaining 49,000 acres were clamoring for water all the time (457). After the syphon was constructed in 1912 the government was able to deliver in that year water enough for from 7,000 to 20,000 acres, the amount increasing from year to

year until in 1917 there was enough to irrigate 52,000 acres (458–9). A few people in tract A were also furnished water for many years at less than cost (437).

THE PUBLIC NOTICE OF APRIL 6, 1917, WHICH IMPOSED A CONSTRUCTION CHARGE OF $75 PER ACRE.

There is no testimony in the record as to the actual cost of the project, although there is enough to indicate that its cost was in excess of the $3,000,000 set aside by the Secretary in 1904 (438–9).[4] The cost as finally determined by the notice of April 6, 1917, is a combination of the actual and the estimated cost, the former comprising the cost of the work already done, and the latter the estimated cost of what will be necessary from time to time in putting in drainage works. But a portion of the cost is charged to the lands on the California side and a portion to the lands in the Yuma Mesa (445).

The public notice of April 6, 1917, will be found at pp. 469–474, a construction charge of $75 per acre being imposed. Certain lands are described in this notice (470), and later a supplementary notice was issued, the date of which does not appear. But it was admitted on the trial that the original and the supplementary notices include all of the lands in tract C (474–5).

[4] As already stated, however, the 16th annual report (p. 68) shows that up to June 30, 1917, $8,387,641.24 had been expended.

THE COURT DID NOT PERMIT THE DEFENDANTS TO INTRODUCE TESTIMONY AS TO WHAT WAS SAID BY THE RECLAMATION OFFICIALS AT THE MEETING OF MAY 28, 1904, ON THE GROUND THAT THE EVIDENCE INTRODUCED BY THE PLAINTIFF WAS IMMATERIAL AND NEEDED NO CONTRADICTION.

See pp. 476–8.

The main divisions in our brief.

Our brief will be divided into three main divisions:

1. Matters relating to the interpretation of the Reclamation Act and to the contract of May 31, 1906.

2. Matters relating to the proposed amendments to the bill of complaint and the admission of testimony.

3. Matters relating to the completion of the project.

ARGUMENT.

Matters relating to the interpretation of the Reclamation Act and to the contract of May 31, 1906.

THIS COURT HAS HELD THAT THE UNDERLYING PURPOSE OF THE RECLAMATION ACT IS TO REQUIRE THE LANDS TO PAY BACK TO THE RECLAMATION FUND THE COST OF THE PROJECT, THUS INSURING THE FUND AGAINST DEPLETION; AND THAT THIS PURPOSE WILL BE DEFEATED IF THE COST OF MAINTENANCE IN ADDITION TO THAT OF CONSTRUCTION IS NOT INCLUDED. THE SAME REASONING IS APPLICABLE HERE.

Swigart v. *Baker*, 229 U. S. 187.

SECTION 4 OF THE RECLAMATION ACT SPECIFICALLY RECOGNIZES THAT THE PUBLIC NOTICE THEREIN MENTIONED IS NOT TO BE ISSUED PRIOR TO THE TIME CONTRACTS FOR CONSTRUCTION ARE LET. IGNORING ALL THIS, APPELLANTS CONTEND THAT THE SECRETARY OF THE INTERIOR ISSUED A PUBLIC NOTICE ON MAY 10, 1904, WHICH WAS LONG PRIOR TO THE DATE ANY CONTRACTS WERE LET.

The contract for the construction of the Laguna dam was let in June, 1905 (428, 488), to be com-

pleted within two years (435, 437). Work was begun in July, 1905 (379, 488). The levees along the Gila River were begun in 1905 or 1906 (486, 488). The levees along the Colorado River were built under contract (488–9). The record does not indicate when all of the various contracts were let, but the appellants at the trial recognized that the first one was let in 1905 (536). Moreover, the annual reports of the Reclamation Service make it clear that no contract was let prior to 1905. See 4th Annual Report, 97.[5] The Court of Appeals held in this case (634) that the Act contemplates that contracts shall be let before the public notice provided for in § 4 is given. A similar holding was made in *Payette-Boise, etc.*, v. *Cole*, 263 Fed. 734.

IT IS APPARENT THAT THE SECRETARY OF THE INTERIOR DID NOT HAVE THE NECESSARY DATA BEFORE HIM IN 1904 TO DETERMINE THE CHARGE PER ACRE THAT SHOULD BE IMPOSED.

All this is apparent from a reading of the testimony. In addition, see the following annual reports: 3rd (1904) 192; 4th (1905) 97; 5th (1906) 100; 6th (1907) 74.

It is of course important in this connection to bear in mind that § 4 of the Reclamation Act provides that "The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably."

[5] See also the 15th annual report of the reclamation service, which gives under the heading "History of Construction and Engineering Features," a statement of the various contracts, etc. (p. 70).

THE ANNUAL REPORTS OF THE RECLAMATION SERVICE TRANSMITTED TO CONGRESS SHOW WITH RESPECT TO EACH PROJECT UNDERTAKEN THE DATE THAT PUBLIC NOTICE IS GIVEN. IT IS SIGNIFICANT THAT THE FIRST TIME MENTION IS MADE OF A PUBLIC NOTICE IN CONNECTION WITH THE YUMA PROJECT IS IN THE 16TH ANNUAL REPORT FOR 1916-1917.

The following is a list of the public notices appearing in these annual reports up to the year 1917, when mention is made for the first time of the public notice with respect to the Yuma project:

6th report (1907): Minidoka (86).

7th report (1908): Belle Fourche (180); Buford-Trenton (154); Carlsbad (143); Garden City (93); Huntley (103); Minidoka (82); North Platte (130); Shoshone (208); Sun River (117); Truckee-Carson (136); Umatilla (173); Williston (161).

8th report (1909): Belle Fourche (179); Carlsbad (135); Garden City (87); Huntley (98); Klamath (172); Lower Yellowstone (114); Minidoka (72); North Platte (121); Okanogan (189); Shoshone (212); Truckee-Carson (130); Umatilla (163); Williston (153); Yakima (198).

9th report (1910): Belle Fourche (262); Carlsbad (206); Klamath (250); Minidoka (127); North Platte (187); Okanogan (285); Truckee-Carson (198); Umatilla (239); Yakima (300); Yuma, lands in California (79).

10th report (1911): Belle Fourche (212); Buford-Trenton (187); Carlsbad (172); Lower Yellowstone (149); Minidoka (106); North Platte (159); Okanogan (225); Shoshone (246); Sun River (144); Sunnyside

(235); Tieton (235); Truckee-Carson (167); Umatilla (199); Williston (188).

11th report (1911–12): Belle Fourche (229); Buford-Trenton (224); Carlsbad (223); Huntley (212); Lower Yellowstone (214); Minidoka (205); Missouri River (224); North Platte (215); Okanogan (234); Shoshone (242); Sun River (212); Sunnyside (235); Tieton (237); Truckee-Carson (220); Umatilla (227); Williston (226); Yakima (235); Yuma, lands in California (204).

12th report (1913): Minidoka (98); North Dakota (186); North Platte (153); Okanogan (223); Shoshone (258); Sun River (139); Sunnyside (240); Tieton (241); Truckee-Carson (164); Umatilla (195); Yuma, lands in California (64).

13th report (1914): Huntley (151); Minidoka (119); Lower Yellowstone (178); Milk River (161); North Dakota (235); Klamath (255); North Platte (191); Okanogan (285); Sunnyside (304); Tieton (309).

14th report (1915): Belle Fourche (258); Carlsbad (204); Huntley (135); Klamath (251); Lower Yellowstone (166); Minidoka (104); North Platte (176); Okanogan (286); Shoshone (319); Sun River (158); Tieton (301); Truckee-Carson (189); Umatilla (240); Uncompahgre (83); Yuma, operation and maintenance charges (60).

15th report (1915–16): Carlsbad (315); Umatilla (362–368); Shoshone (502); Truckee-Carson (294-298); Klamath (381–2); Huntley (203–208); Yakima (476); North Platte (273–278); Orland (90); Belle Fourche

(397); Minidoka (168–182); Strawberry Valley (420); Sun River (242); Okanogan (442); Lower Yellowstone (252); Yuma, operation and maintenance charges (81).

16th report (1916–17): Salt River (53); Orland (74); Grand Valley (84); Minidoka (117); Huntley (134); Sun River (159); North Platte (177); Truckee-Carson (191); Carlsbad (203); Umatilla (239); Klamath (258); Belle Fourche (272); Strawberry Valley (288); Okanogan (308); Yakima (328); Shoshone (343); Yuma (65).

THE VERY DOCUMENTS ON WHICH THE APPELLANTS RELY PLAINLY INDICATE ON THEIR FACE THAT NO FINAL DETERMINATION HAD BEEN MADE WITH RESPECT TO THE CHARGE PER ACRE TO BE IMPOSED.

In this connection see the following: (1) Letter from Walcott, Director of the Geological Survey, to the Secretary of the Interior, dated May 9, 1904 (199); (2) The Secretary's reply of May 10, 1904, setting aside $3,000,000 for the project (200); (3) letter of May 16, 1904, from Newell, chief engineer, to the Yuma County Water Users' Association (215); in particular the paragraphs at pp. 216, 224, 225, 226.

Even the contract of May 31, 1906, shows upon its face that the Secretary of the Interior must *thereafter* determine certain matters before any public notice can be given.

This contract contains a recital (42) that under the articles of incorporation the shareholders are required to initiate water rights "as soon as such

rights may be initiated, and thereafter complete the acquisition thereof in the manner and upon the terms and conditions to be prescribed by the Secretary of the Interior."

The contract then goes on, in paragraph 1 (43), that "if the said Secretary of the Interior *shall* authorize and *shall* cause the construction of said irrigation works, then," etc. In paragraph 3 (44) it is provided that the aggregate amount of water rights to be used shall not exceed the number of acres capable of irrigation by the total available water; and "The Secretary of the Interior *shall* determine the number of acres so capable of such irrigation as aforesaid," etc. In paragraph 4 (44) it is provided that payments for water rights, under the provisions of the Act of Congress, shall be divided into not less than ten annual instalments, the first being payable at the time of the completion of the works, after due notice by the Secretary of the Interior to the association; and that the cost per acre shall be equal throughout the entire district proposed to be irrigated, without a single word being said as to what the cost shall be. It is provided in paragraph 5 (45) that the association is to guarantee "the payments for that part of the cost of the irrigation works, which *shall* be apportioned by the Secretary of the Interior to its shareholders," etc.

All these provisions unmistakably indicate that the charge per acre was not then determined.

ALTHOUGH THE SECRETARY OF THE INTERIOR DID IN FACT DETERMINE IN 1904 THAT THE PROJECT WAS FEASIBLE, HE NEVER AT THAT TIME MADE ANY ESTIMATE OF THE COST AS A BASIS TO DETERMINE THE CHARGE PER ACRE, AND IN FACT HAD NOT DETERMINED BY MAY, 1904, WHICH OF THE VARIOUS ALTERNATIVE PLANS HE WOULD SELECT.

This is indicated by Newell's letter of May 9, 1904, to the Secretary of the Interior, and by the latter's reply of May 10, 1904. Newell in his letter (199) says:

> There are a large number of alternatives to be considered and difficult problems to be solved, but the matter has developed from the engineering side to a point where it is possible to consider the larger features and to set aside provisionally a sufficient sum of money to carry out the work contingent upon satisfactory arrangements being made with the owners of lands and vested rights and the complete solution of other matters now pending.

In his reply (201) the Secretary says:

> In compliance with your recommendation, I hereby set aside the sum of $3,000,000, or so much thereof as may be necessary, from the fund provided by the Act mentioned, for the construction of the Yuma project, *under the conditions you have set forth.*

SECTION 4 OF THE RECLAMATION ACT ENUMERATES FIVE THINGS WHICH THE PUBLIC NOTICE MUST CONTAIN. THE ALLEGED PUBLIC NOTICE OF MAY 10, 1904, UPON WHICH APPELLANTS RELY, FALLS SHORT OF MEETING THESE REQUIREMENTS, THUS AGAIN DEMONSTRATING THAT IT WAS NOT THE NOTICE WHICH THE ACT CONTEMPLATES.

The public notice must contain:

(1) The lands irrigable under the project.

(2) The limit of area per entry.

(3) The charge per acre imposed.

(4) The number of annual instalments.

(5) The time when payments shall commence.

It is needless to say that the letter of the Secretary of the Interior of May 10, 1904, printed at p. 199 and again at p. 226, does not measure up to these requirements. And the same is true of the pamphlet (Ex. 15; 209), which was distributed at Yuma on May 28, 1904. Moreover, Newell's letter of May 16, 1904, which was a part of the pamphlet, expressly says:

> The Secretary reserves the right to make such revisions in the plans and estimates as further investigations and circumstances may dictate to be requisite for the public welfare.

THE APPELLANTS' MAIN WITNESS AND ONE OF THE ORGANIZERS OF THE ASSOCIATION ADMITTED THAT HE DID NOT REGARD THAT THE CHARGE PER ACRE WAS ACCURATELY DETERMINED AT THIS TIME.

Bondesson testified—

> and even at the time of the issuance of what I have called the public notice I didn't regard the charge as fixed as an exact sum.

THE SECRETARY OF THE INTERIOR MUST NECESSARILY BE INVESTED WITH A WIDE DISCRETION TO DETERMINE WHEN AN ESTIMATE OF THE COST IS TO BE MADE AS A BASIS FOR IMPOSING CHARGES. AND LIKEWISE MUST BE INVESTED WITH A WIDE DISCRETION TO DETERMINE WHEN THE PUBLIC NOTICE IS TO BE GIVEN. OTHERWISE THE VERY PURPOSE OF THE ACT OF CONGRESS TO MAINTAIN THE RECLAMATION FUND IN PERPETUITY MIGHT BE DEFEATED.

If, as this court held in *Swigart* v. *Baker*, *supra*, the purpose of the Act is to maintain a revolving fund in perpetuity, it is apparent that the whole scheme can be thwarted by an immature attempt to estimate the cost and fix the per acre charge. The Act contemplates that funds may not be immediately available for the construction of the entire project. Accordingly it is provided (§ 4) that the Secretary "may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project." If, as the appellants contend, the Secretary *must* determine at the inception of the project what its cost will be, and *must* use this estimate as the basis for determining the charge per acre, it is apparent that inaccurate estimates of the cost, particularly with respect to projects that are to be constructed in successive sections only when the necessary money is available, will frustrate the very purpose of the law.

Moreover, the appellants' contention is one of complete antagonism to the reasoning of this court in the case just mentioned. If, as there held, "the estimated cost of construction of the project" is

broad enough to embrace maintenance charges, is the Secretary of the Interior powerless to impose such charges in future years because he fails in his estimate of cost to include a sum on this account?

THE CONTRACT OF MAY 31, 1906, IS PLAIN AND UNAMBIGUOUS, AND REQUIRES THE WATER USERS' ASSOCIATION TO PAY THE COST.

Paragraph 5 (45) reads:

> The said Yuma County Water Users' Association agrees that it will promptly collect or require prompt payment in such manner as the Secretary of the Interior may direct, and hereby guarantees the payments for that part of the *cost* of the irrigation works, which shall be apportioned by the Secretary of the Interior to its shareholders.

IT IS UNNECESSARY TO DETERMINE IN THIS CASE WHETHER THE ESTIMATED OR THE ACTUAL COST MUST CONTROL. IT IS SUFFICIENT TO HOLD THAT WHEN THE SECRETARY OF THE INTERIOR DETERMINES THE COST WITH A VIEW OF IMPOSING THE PER-ACRE CHARGE, HE IS AT LIBERTY TO USE WHATEVER ACCURATE INFORMATION HE THEN POSSESSES.

The District Court held that § 4 of the Reclamation Act contemplates that the actual cost controls in fixing the per-acre charge.

"It is clear to my mind," said the district judge, "that Congress intended that the actual and not the estimated cost of the construction of all irrigation works for the reclamation of arid and semi-arid lands should be assessed against the lands, etc. (553).

The Court of Appeals used somewhat different language:

> By estimated cost is not meant the actual exact final sums paid for construction, but rather such sums as it is believed after careful computations will cover the expenses and outlay directly and fairly connected with the construction of the project. The statute contemplates that contracts shall be let prior to the giving of the public notice, and the obvious reason for this is to give to the Secretary of the Interior an adequate knowledge upon which to make an estimate (634).[6]

As we view it, there is no disagreement between the two. The substance of the holdings of both courts is that when the Secretary of the Interior determines the "estimated cost" with a view to fixing the per acre charge, he is at liberty, *when* that determination is made, to take into consideration the facts as they *then* exist. If he *then* knows what the actual cost is, he is not required to shut his eyes to this accurate information and make an estimate as of 1904.

> *Cf.*, however, *Payette-Boise, etc.* v. *Cole*, 263 Fed. 734.

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[6] In this connection see the 15th annual report of the reclamation service, which gives (p. 70) a history of the various contracts under the heading "History of Construction and Engineering Features."

THE ACT OF JUNE 25, 1910, 36 STAT. 835, APPROPRIATING $20,000,000 FOR THE RECLAMATION SERVICE UNDER THE CONDITIONS THEREIN MENTIONED, IS A LEGISLATIVE INTERPRETATION THAT THE ESTIMATES OF COST UNDER §3 OF THE RECLAMATION ACT TO ENABLE THE SECRETARY OF THE INTERIOR TO DETERMINE THE FEASIBILITY OF THE PROJECT ARE NOT THE ESTIMATES OF COST REQUIRED BY §4 OF THAT ACT UPON WHICH TO BASE THE PER ACRE CONSTRUCTION CHARGE.

No one can read this Act without coming to the conclusion that Congress was disappointed and even alarmed at the great cost of some of the reclamation projects that had been undertaken. Evidently the cost had exceeded the estimates. The reclamation service had run out of funds. It was, therefore, necessary either to abandon all work or to provide new funds to enable projects already under way to be carried to completion. The latter alternative was selected. Accordingly, $20,000,000 were appropriated. But the Act, it will be noted, contains a specific provision that all advances are to be paid back in the manner therein provided. Obviously, this would be impossible *if* the preliminary estimates made under §3 *must* govern in determining the per acre charge. The intent of Congress to make the various reclamation projects self-sustaining, manifested at the time that the Reclamation Act of June 17, 1902, was passed, would necessarily be defeated. This circumstance therefore affords additional proof of the fact that Congress never intended that the Secretary of the Interior *must* use the preliminary estimates in determining the per acre construction charge.

As to the right to resort to legislative interpretation, see *Swigart* v. *Baker*, 229 U. S. 187.

MATTERS RELATING TO THE AMENDMENT OF THE BILL OF COMPLAINT AND THE ADMISSION OF TESTIMONY.

THE CONTENTION THAT THE TRIAL COURT WAS WRONG IN REFUSING TO GRANT THE APPELLANTS LEAVE TO FILE A SUPPLEMENTAL PLEADING, ALLEGING THAT THE SECRETARY OF THE INTERIOR AGREED TO GIVE THE LANDOWNERS AN ADDITIONAL CREDIT OF $1,600,000 ON THE $75 PER ACRE CHARGE, ON ACCOUNT OF HIS CONTRACT WITH THE IMPERIAL VALLEY IRRIGATION DISTRICT WHEREBY THAT DISTRICT WAS ALLOWED TO CONNECT WITH THE LAGUNA DAM ON PAYMENT OF THIS AMOUNT, IS WHOLLY DEVOID OF MERIT.

The evidence is uncontradicted that when the Secretary of the Interior, on April 6, 1917, imposed a charge of $75 per acre he gave the project credit for $1,600,000 on account of his contract with the Imperial Valley Irrigation District, although the money was not then in his hands and, of course, never would be, if that district should elect not to avail itself of the option given under the contract to connect with the Laguna dam. The Secretary was, however, apparently so confident that the money would eventually be paid that he felt justified in assuming that the money was already in his hands. Accordingly in determining the cost of the project he gave credit for the $1,600,000. This is beyond dispute (446–9, 452).

It seems, however, that the farmers were not satisfied with this and wanted the Secretary to give them a *double* credit; that is to say, to again give them credit on the $75 per acre charge if the Imperial Valley Irrigation District should thereafter exercise its option to connect with the Laguna dam and

actually pay the $1,600,000 for this privilege (452–4). In rebuttal the appellants introduced testimony that the Secretary made a promise to this effect, and that he said at the time that he would reduce his promise to writing, but before he got around to it he left Washington on a Liberty loan drive, and that was the end of the matter (537–40). It would seem that what the Secretary really said was that he would endeavor to do this if the farmers on their part would get legislation from Congress authorizing him to do so (541). He took the position that he had no authority to agree with the farmers to give them the credit they were asking for, and told them that it would be necessary for them to go before Congress (453).

In the light of all this the appellants, at the conclusion of the trial, asked leave to file a supplemental pleading setting forth that the Secretary had made such a promise (542). The pleading that was tendered will be found at pp. 138–140. The court denied the request on two grounds (543), either one of which is sufficient to support the ruling.

We think nothing more need be said, particularly so in view of the statement at p. 75 of the appellants' brief: "The whole matter is so peculiar and unprecedented that we believe it would be hopeless to even attempt to search for authorities in point."

THERE IS NO MERIT IN THE CONTENTION THAT THE TRIAL COURT WAS WRONG IN REFUSING TO ALLOW THE PLAINTIFFS TO INTRODUCE EVIDENCE IN SUPPORT OF THEIR AMENDMENT TO THE BILL WITH RESPECT TO HOMESTEADERS WHOSE ENTRIES WERE REQUIRED TO BE REDUCED TO THE 40-ACRE FARM LIMIT.

The day the case came on for trial the appellants filed an amendment to their bill by adding a new paragraph to the effect that on May 10, 1904, many thousands of acres in tract C were held in private ownership under homestead and desert-land entries; that on that date the entrymen were members of the water users' association; that Theobald had, on May 5, 1901, entered 160 acres; that on July 12, 1902, the Secretary withdrew the same under the provisions of the Reclamation Act; that owing to the noncompletion of the project Theobald was unable to make cultivation and improvements, and accordingly was obliged, in 1908, to relinquish his entry in favor of Hevener, who made a new homestead entry, paid the fees, received a certificate, offered final proof in 1915, and thereupon received a certificate showing residence and cultivation; and that he is now required, as a condition of receiving water, to reduce his farm unit to 40 acres. This, it is alleged, is a typical case (58–60). The matters alleged were put in issue by stipulation (134).

At the trial plaintiff made an offer of proof (372). The court later made a formal ruling (504) to the effect that the matters alleged were immaterial and accordingly no testimony could be introduced.

The offer of proof fell far short of an offer to prove *all* the matters alleged, and the contention now ad-

vanced by appellants might therefore properly be disposed of on this ground alone. But even if we disregard this defect, the appellants' contention is without merit. Section 3 of the Reclamation Act authorizes the Secretary—

> at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible for irrigation from said works: Provided, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act.

Section 4, it will be recalled, provides, among other things, that the public notice therein mentioned shall contain the "limit of area per entry." The appellants expressly admit in their brief (p. 143) that the Secretary of the Interior did not, even in 1904, issue any public notice under §4 designating the limit of area per unit. On the contrary they frankly say, at p. 79 of their brief: "But so far as is disclosed in this case the Secretary does not seem to have given any public notice of the limit of area per entry within the Yuma Project until April 6, 1917." Moreover, the appellants openly acknowledge the weakness of their position. "It may be," they say in their brief, "that in law those facts, even if admitted, would not entitle that particular class of

landowners to the relief prayed for as to them" (p. 63). Again, at p. 80, "We appreciate the fact that a great deal can be said in support of the contention that the Secretary has even now a right to limit the area of those entries."

But in the face of all these deliberate admissions, it is said at another place in the brief (p. 81) that the Secretary, at some time prior to December 5, 1910, issued a public notice fixing the unit at 80 acres with respect to public lands and 160 acres with respect to private lands; and reference is made to the 9th annual report of the Reclamation Service, p. 73, in support of this statement. This reference, however, shows on its face that the units there mentioned pertain to lands in California, not in Arizona, as the appellants would have this court believe.

THERE IS NO MERIT IN THE CONTENTION THAT THE COURT IMPROPERLY ADMITTED TESTIMONY ON CROSS-EXAMINATION WITH RESPECT TO LAND VALUES AND MADE FINDINGS OF FACT WITH RESPECT TO THE SAME, WHILE DENYING TO APPELLANTS THE OPPORTUNITY OF INTRODUCING TESTIMONY ALONG THE SAME LINES.

The bill alleges that the lands could not afford to pay $75 per acre and that this is out of all proportion to the value of the project (25). The trial court, on the cross-examination of a witness, admitted the testimony complained of for a limited purpose (294). But complaint is made that the trial judge, after refusing (504) to allow the plaintiffs to introduce testimony in accordance with an offer of proof (371), nevertheless based his decision, in part

at least, on testimony which the offer of proof was designed to attack. What the trial judge, in his opinion, said was this (561):

> Incidentally, it may be said that while the cost of construction was much greater than was anticipated, the lands have been greatly benefited and the testimony shows that the annual net revenue per acre is almost equivalent to the cost per acre of the project.

Evidence was introduced without objection, entirely aside from that elicited on the cross-examination complained of, upon which the court could make such a finding. Davis, on cross-examination by appellants, gave testimony of a similar nature. He said that when some of the lands were thrown open to entry after the public notice of 1917 had been issued, the average number of persons trying to acquire the respective tracts was about 50. In one instance 126 persons filed applications for the same tract. "That illustrates," he went on to say, "the fact that the lands are in much demand. They have increased the value of the land, increased the value of the farmers' products, increased the number of people in the valley; and all this in spite of an announcement of the $75 charge. It is the most prosperous and most highly productive per acre project in the reclamation service. So far as I know, I do not know of any private development that large that is as promising and is as prosperous as the Yuma Valley" (461–2).

Furthermore, the various annual reports of the reclamation service, which both parties admitted at the trial the court could take judicial notice of (203–208), contain data affording ample basis for the statement in the trial judge's opinion.

But the important part of the whole matter is that the trial judge's decision was in no way influenced by the matters alluded to. He repeatedly stated his position throughout the trial, and the finding complained of was but a mere incidental statement in no way forming the basis of his decision.

Matters relating to the completion of the project.

THE PROJECT IS COMPLETED. BOTH OF THE LOWER COURTS SO HELD, AND THE CASE THEREFORE FALLS WITHIN THE FAMILIAR RULE THAT THIS COURT WILL NOT DISTURB THE CONCURRENT FINDINGS OF THE TWO LOWER COURTS UNLESS PALPABLY ERRONEOUS.

The evidence as to the completion of the project is referred to in our statement of the facts, and need not be repeated here. One statement of the appellants must not, however, remain unchallenged. They say that out of 22 miles of drains to be constructed only 3 have been built. The 1904 map, however, shows that only 14 miles were contemplated, and, according to the testimony, 13 have been built (436). No testimony was introduced that any of the plaintiffs was suffering on account of lack of drainage. Moreover, it is significant that the expert witness whom the plaintiffs put upon the stand to testify that the project was not completed, did not once refer to any lack of drainage as a basis for his opinion.

On the contrary, the sole thing he complained of was that levees had not been built to control the Colorado and Gila rivers. After going into this feature, he concluded with the statement, "I think that outlines my reason for stating that in my judgment the project is not completed" (512).

The case falls within the well-established rule that this court will not disturb the concurrent findings of the two lower courts unless palpably erroneous.

Brewer-Elliott, etc. v. *United States,* Adv. Op., November 13, 1922.
Bodkin v. *Edwards,* 255 U. S. 221.

THE APPELLANTS' CONTENTION THAT THE PROJECT IS NOT COMPLETED BECAUSE TRACTS A AND B HAVE BEEN ELIMINATED OVERLOOKS THE FACT THAT THE SECRETARY OF THE INTERIOR DECIDED THAT IT WAS NOT PRACTICABLE TO INCLUDE THEM; AND, MOREOVER, DISREGARDS BOTH THE PROVISION IN THE PAMPHLET (EX. 15) WHICH RESERVED TO THE SECRETARY THE RIGHT TO MAKE SUCH REVISIONS IN THE PLANS AS THE PUBLIC INTERESTS MIGHT DICTATE, AS WELL AS THE PROVISION IN THE CONTRACT OF MAY 31, 1906, WHICH GAVE TO THE SECRETARY THE RIGHT TO DETERMINE THE NUMBER OF ACRES SUSCEPTIBLE OF IRRIGATION.

The appellants' contention that because tracts A, B, and C were included in the Lower California Irrigation District, therefore *all* of the lands must be reclaimed before it can be said that the project is completed, entirely ignores the essential facts mentioned in the heading. Carried to its ultimate conclusion, it would mean that *every* acre in that district, no matter how impracticable, must be reclaimed. Obviously, this could not have been the intention of the parties. The Secretary, in explicit

terms, reserved the right to make such change in the plans as the public interests might dictate. His finding, supported as it is by substantial testimony, is not subject to review.

Milwaukee Pub. Co. v. *Burleson*, 255 U. S. 407.

Cf. Kihlberg v. *United States*, 97 U. S. 398.

EVEN IF IT COULD BE SAID THAT THE SECRETARY OF THE INTERIOR WAS IN POINT OF LAW NOT AUTHORIZED TO ELIMINATE TRACTS A AND B, NEVERTHELESS HIS EXCLUSION OF THESE TRACTS WOULD NOT CONSTITUTE A MATERIAL BREACH OF THE CONTRACT WHICH WOULD ENTITLE THE APPELLANTS TO THE RELIEF THEY CLAIM.

There is no testimony that any of the landowners in tract C will be damaged by the exclusion of tracts A and B. The only benefit that they could possibly derive from having these tracts remain in the project would be to reduce the per acre construction charge. But although these tracts have been excluded, the lands in the Yuma Mesa have taken their place. There are approximately 18,000 acres in tracts A and B. The lands in the Yuma Mesa, which were not included when the project had its inception, comprise something like 53,000 acres, all of which are to stand their share of the cost. (See our statement of facts under the heading "Even after eliminating tracts A and B, the area of the lands included in the project upon which the charges of construction are assessed is greater than that originally contemplated.") Obviously, therefore, it can not be said, from any point of view, that there has been a *material* breach of the contract.

IF THE POSITION OF THE APPELLANTS IS CORRECT, TO THE EFFECT THAT TRACTS A AND B MUST BE BROUGHT INTO THE PROJECT BEFORE IT CAN BE SAID THAT THE WORKS ARE COMPLETED WITHIN THE MEANING OF THE CONTRACT OF MAY 31, 1906, THE NECESSARY RESULT WILL BE TO POSTPONE FOR ALL TIME TO COME THE COMPLETION OF THE PROJECT, OR ELSE THE SECRETARY OF THE INTERIOR MUST RESTORE THE COLORADO AND GILA RIVERS TO THE POSITIONS THEY OCCUPIED IN 1904.

It will be recalled in this connection that the Colorado River has materially changed its course, at places probably a mile or even more (523). And it will also be recalled that it was finally determined that a safe crossing for the canal could not be made over the Gila River because of the destructive action of that river (430), for which reason it was found necessary to build the canal along the California side and carry the water across the Colorado River to Arizona by means of a syphon, which was constructed just below Yuma (381).

The decree, it is respectfully submitted, should be affirmed.

JAMES M. BECK,
Solicitor General.
WILLIAM D. RITER,
Assistant Attorney General.

JANUARY, 1923.

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